SUPREME COURT, U. S.

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No. 75-3084

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH C. TARQUENO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Joseph C. Tarqueno, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on August 4, 1975.

OPINION BELOW

The Judgment of the District Court is not reported. The Order affirming this conviction is not yet reported and is reprinted as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on August 4, 1975. No petition for rehearing was filed.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether a defendant in a Federal criminal jury case may be constitutionally deprived of a fair trial, assuming evidence sufficient to convict, where the government prosecutor, over objection(s) argued to the jury, *inter alia:*

(1) "There is no question the defendant is guilty beyond not only a reasonable doubt, but in my mind any shadow of a doubt."

(2) "I do not think he (Tarqueno) was doing this for free."

(3) "I do not believe that Jimmy Byrnes could, in fact, have gotten the bills even if he wanted to."

(4) "We have very good evidence, I think, to show that Mr. —"

(5) "And if you do not believe him, there is no one else to believe." (Petitioner did not testify at the trial.)

II. Whether the prosecutor's closing argument (unprovoked and over repeated defense objections which were overruled) compels this Court to exercise its Supervisory Power in granting the Writ and reversing this Federal conviction (*Cf., Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974).

III. Should not the Federal Criminal Justice system have a realistic standard to apply when reviewing "improper closing argument(s)"?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> No person, shall be . . . deprived of life, liberty, or property, without due process of law . . .

Statement of the Case

The facts relevant to this petition are as follows:

In November, 1973 Jimmy Byrnes was arrested for a counterfeiting offense in Hammond, Indiana (Tr. 95). Following his arrest Byrnes agreed to become an informant (Tr. 96). Byrnes was unavailable at trial (Tr. 71) albeit he was a paid informant (Tr. 97).[1]

On November 19, 1973 Byrnes, in the company of an undercover agent, met Tarqueno by virtue of arrangements Byrnes had made (Tr. 97, 115). After being introduced to the undercover agent, Tarqueno sold the agent eight (8) $10.00 counterfeit bills for $40.00.[2] This took place in the Northern District of Illinois (Chicago Ridge, Illinois.) A second meeting was set up by Byrnes. At that meeting all three men met in Chicago, Illinois on Decem-

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[1] The Government spent $300.00 in making this case. Tarqueno received $40.00 all told (the balance of money given Tarqueno in payment for the counterfeit was recovered at the time of arrest). Byrnes received $260.00 for undisclosed "expense monies" from the Government. Thus, out of the $300.00 expended by the Government the informant received all but $40.00.

[2] At this meeting Tarqueno gave the undercover agent ten (10) counterfeit $10.00 bills. The agent purchased eight (8) of the bills and returned two (2) of them to Tarqueno. This transaction comprised count one of the indictment and Tarqueno received a two year sentence for that transaction.

ber 14, 1973. Tarqueno and the undercover agent went into the women's washroom in a saloon where Tarqueno gave the undercover agent $1,900.00 in counterfeit notes in exchange for $850 in genuine currency (Tr. 44). Upon leaving the tavern where the exchange of money took place Tarqueno was arrested and the genuine money was recovered from his person.[3]

In January, 1974 Tarqueno was indicted by a Federal Grand Jury sitting in Chicago. He was charged in a single indictment with two counts of violating the Counterfeiting statute (18 U.S.C.A. section 473).

On January 15 and 16, 1975 Tarqueno was tried, by jury, in the Federal District Court in Chicago. Tarqueno did not testify; his defense was entrapment (*e.g.*, set-up by the informant).[4] The jury was instructed on the entrapment defense. The evidence presented to the trial jury was basically undisputed. He was convicted on both counts.

In March, 1975 Tarqueno was sentenced to a term of two (2) years in custody with a consecutive probation of three (3) years to follow.

At all times herein pertinent Tarqueno has been represented by private counsel and has been at liberty on his own recognizance bond.

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[3] The December 14 occurrence comprised count two of the indictment. Tarqueno was given a sentence of probation consecutive to the two year penitentiary sentence from count one.

[4] The informant, Jimmy Byrnes, was unavailable at trial (Tr. 71).

REASONS FOR GRANTING THE WRIT

The unprovoked argument by government counsel included the following:

(1) "There is no question the defendant is guilty beyond not only a reasonable doubt, but in my mind any shadow of a doubt."[5]

(2) "I do not think he (Tarqueno) was doing this for free."[6]

(3) "I do not believe that Jimmy Byrnes could, in fact, have gotten the bills even if he wanted to."[7]

(4) "We have very good evidence, I think, to show that Mr. —"[8]

---

[5](Tr. 133) Clearly an impermissible personal opinion by the Government prosecutor (*Berger* v. *United States*, 295 U.S. 78 (1974).

[6](Tr. 128) No evidence was presented by the Government that Tarqueno got any monies for these two (2) counterfeiting deals. Defense testimony revealed that Tarqueno was not the source for the counterfeit money (Tr. 112-114).

[7](Tr. 132) Since Byrnes (the informer) did not testify and had earlier been charged with the passing of counterfeit monies this comment amounted to the U.S. Attorney supplying facts which were nowise in evidence. Defense counsel had been previously allowed a "standing objection" to the U.S. Attorney's argument (Tr. 132-33).

[8](Tr. 132-33) Another impermissible personal opinion by Government counsel.

(5) "And if you do not believe him, there is no one else to believe." (Petitioner did not testify at the trial).[9]

Not only were objections overruled, but the trial court commented:

"Mr. Ackerman: Object to what he knew or believed. There is no such evidence, if the court please.
The Court: Counsel, once again I caution you that the Government is entitled to draw reasonable inferences from the evidence. The objection is overruled and you may proceed, Mr. Higgins." (Tr. 130).

* * *

We respectfully urge Your Honors to grant the Writ and reverse this conviction notwithstanding our concession that there was sufficient evidence to warrant this conviction.

(1) The split in circuits:

In *United States* v. *Schartner*, 426 F2d 470 (3d, 1970) that Court reversed a Federal Bank robbery conviction because of the Government's Argument to the jury. That prosecutor argued "his personal belief as to Schartner's Guilt." (*Id.* at 478). In *Schartner*, the Court found the evidence sufficient to convict. (*Id.* at 476).

A later case from the same circuit considers the above to formulate a "per se" rule of reversal, *United States* v. *Somers*, 496 F2d 723, 740 (3d 1974). The 1st and 7th Circuits are in accord, albeit *neither* circuit maintains or ad-

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[9](Tr. 143) We respectfully suggest that this comment by Government counsel can be reasonably construed to be unfair comment in light of the fact(s) that neither the informer nor the defendant testified. The witness that did testify was the undercover secret service agent (*e.g.*, *Griffin* v. *California*, 380 U.S. 609 (1965)).

heres to a "per se" rule, see *Greenberg* v. *United States*, 280 F2d 472 (1st 1960); *United States* v. *Wasko*, 473 F2d 1282 (7th, 1973). Further in *United States* v. *Fearns*, 501 F2d 486 (7th 1974) that Court reversed a stolen treasury check(s) conviction because of the Government's closing argument (*id.* at 488-9). This result (reversal) was found to be required notwithstanding the Court's statement that the evidence was sufficient to convict (*id.* at 488). However, in *United States* v. *Gambert*, 410 F2d 383 (4th 1969) that Court reversed a Dyer Act conviction finding that the Government's improper closing argument mandated a new trial where the evidence was "not so one-sided, and the language complained of cannot be treated as a harmless transgression" (*id.* at 385).

What we are saying to this Court is simply the above cases are a representative sample of the conflicts within the several circuits (*cf.*, Rule 19(1)(b), Rules of the Supreme Court).

(2) Should not the Federal Criminal Justice system have a realistic standard to apply when reviewing "improper closing argument(s)"?

(Hereinafter follows a short discussion of the conflicts and varying standards with the circuits.)

The clear and appropriate answer would be YES. Unfortunately the present plethora of decisions lend little aid in the dilemma. For example, in *United States* v. *Bell*, 506 F2d 207 (D.C. cir. 1974) that Court, while affirming a federal narcotic conviction, had this to say about the Government's improper closing argument:

> "Nonetheless, this incident leaves us concerned. Despite the well known legal rules governing prosecutorial argumentation, we have, particularly of late, wit-

nessed a growing number of similar instances of misconduct. Indeed, it seems that judicial decisions holding particular conduct improper but harmless have had but little effect on prosecutorial misbehavior. *It may be that the day is near when reversal instead of admonition may become a necessary prophylactic tool to insure that prosecutorial arguments hew to the law.*" (506 F2d 226)

In *United States* v. *Somers*, 496 F2d 723 (3d 1974) the Court affirmed a multi-count federal extortion and Hobbs Act conviction. While addressing the issue of Government misconduct during closing argument that Court opined:

> "As we indicated earlier, our Court has too frequently been required to review the issue of prosecutorial misconduct. We feel quite strongly that we should not have to deal so constantly with such a recurring issue when it can so readily be avoided. We cannot leave this discussion, therefore, without some further observations pertaining to this general subject.
>
> We do not suggest that a prosecutor abandon eloquence or advocacy.
>
> > 'A prosecutor must draw a careful line. On the one hand, he should be fair;-he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even stirring eloquence cannot convict him of hitting foul blows.'
>
> Viereck v. United States, 318 U.S. 236, 253, 63 S.Ct. 561, 569, 87 L.Ed. 734 (1943) (Black, J., dissenting). Nor do we suggest that a prosecutor is precluded from 'hitting hard.' Berger v. United States, *infra*, 295 U.S. at 88, 55 S.Ct. 629. Nevertheless, preparation, discipline, knowledge, restraint and responsibility should dictate the manner by and the area in which the blows should be struck.

> Our society and our Courts cannot afford the luxury in terms of time and money of permitting federal prosecutors, even during lengthy trials, to abandon prosecutorial disciplines. *'A few injudicious words uttered in the heat of battle by an Assistant United States Attorney may undo months of preparation by police, prosecutorial, and judicial officers.''* United States v. White, *supra,* 486 F.2d at 204. [Emphasis ours.]
>
> The remedy rests with and in the office of each federal prosecutor. We suggest that this remedy be applied liberally and often. Absent such discipline, we can foresee that our approach to this problem may require more drastic and prophylactic rules.'' (496 F2d at 742).

In *United States* v. *White,* 486 F2d 204 (2d 1973) that Court affirmed an assault conviction that had occurred in a Post Office. The sole issue, on review, related to the prosecutor's summation. While affirming the Court opined:

> ''Although we are affirming the conviction, we seek by our admonition to remind the federal prosecutor once again of the delicate role he plays. When an Assistant United States Attorney appears in court, and especially in a trial before a jury, he represents and personifies the government. He must prosecute cases diligently and vigorously. The public expects no less. But, he must also perform his task with dignity and self-discipline. The public deserves no less. We recall Justice Black's articulation of the prosecutor's dilemma:
>
> > A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows.

Viereck v. United States, 318 U.S. 236, 253, 63 S.Ct. 561, 569, 87 L.Ed. 734 (1943) (Black, J., dissenting).

> The exceedingly fine line which distinguishes permissible advocacy from improper excess is to be drawn within the concrete terrain of specific cases. *See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 127* (1971). Accordingly, we do not intend to formulate per se rules or declare that certain words will automatically trigger mistrials or reversals of convictions. Certainly, advocates may marshal all inferences that the evidence supports and indulge in nonprejudicial flourishes of rhetoric. Eloquence is not misplaced in the courtroom. But the prosecutor's comments in this case did not rise to the level of oratory or eloquence. He engaged, quite simply, in name-calling, but since the *prejudice* to appellant was minimal, we affirm." (486 F2d at 207; footnote omitted).

In *White,* the Court declined to formulate or fashion a "per se" reversible error rule (*id.* at 207) although the Third Circuit Court of Appeals in *United States* v. *Somers, et al., ante,* recognized a "per se" rule for that circuit (496 F2d at 740).

The A.B.A. Standard 5.8(b) states:

> *Standard* 5.8(b) *provides:*
> It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

This Standard has expressly been approved in the Second Circuit, *United States* v. *White, ante.*

The Seventh Circuit joined the D.C. Circuit and the Third Circuit in warning the Government prosecutors

about the risk involved in delivering an improper closing argument to the jury.

In *United States* v. *Trutenko,* 490 F2d 678 (7th Cir., 1973) a divided panel affirmed a mail fraud conviction involving a doctor where the issue on appeal related to comments by the prosecutor during his closing argument. The majority opinion affirmed the conviction with the following caveat:

> "The burden of persuading us that any similar appeal in the future was not deliberate prosecutorial misconduct requiring us to exercise our supervisory power will indeed be a heavy one." *Cf., United States* v. *Ott,* 489 F.2d 872 (7th Cir., 1973); *United States* v. *Fullmer,* 457 F.2d 447 (7th Cir., 1972) (490 F.2d at 681).

Chief Judge Swygert, dissenting, opined that past warnings to the sovereign about improper remarks called for the drastic step of reversal (*id.* at 682-3).

In contrast to the affirmation in *Trutenko* the same Court reversed a narcotic conviction in *United States* v. *Wasko,* 473 F2d 1282 (7th, 1973). While reversing, the Court condemned the personal opinions of the prosecutor:

> "In so arguing, the prosecutor ignored DR 7-106(C) of the Code of Professional Responsibility of the American Bar Association, which states:
>
> > 'In appearing in his professional capacity before a tribunal, a lawyer shall not:
> >
> > • • •
> >
> > '(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
> >
> > '(4) Assert his personal opinion . . . as to the guilt or innocence of an accused; . . .' (*id.* at 1283-4).

Any realistic analysis is almost meaningless. Absent specific direction from Your Honors each of the Courts take an almost Ad Hoc approach to what is or is not sufficiently improper argument to merit reversal of a Federal criminal conviction.

At least one Court has reasoned that there is a specific standard. In *United States* v. *Peak,* 498 F.2d 1337 (6th, 1974) the Court granted a new trial from an interstate theft conviction. The reason for reversal was the prosecutor's improper argument. In *Peaks* the Court stated:

> "A matter of much greater concern was the United States Attorney's expression of his personal conviction that appellant was a person of bad character. *Such an expression is directly violative of the Berger standard quoted above. See also Donnelley* v. *DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (Decided May 13, 1974). (*Id.* at 1338) (Emphasis ours)
>
> • • •
>
> "We have considered the recent pronouncements on due process standards outlined in Donnelly v. DeChristoforo, *supra.* Our instant case, however, is a federal prosecution and here the standards of Berger v. United States, *supra,* apply in full force." (*Id.* at 1339.)

In *Peaks* there appears no clear expression of whether the evidence was clear and convincing, overwhelming or "not so one-sided as to make a difference."[10]

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[10] The *clear and convincing* test was utilized by the Court in *United States* v. *White,* 486 F2d 204 (2nd, 1973); an example of the Court declining to reverse because of *overwhelming evidence* is *United States* v. *Bowen,* 500 F2d 41 (6th, 1974); the *"not so one-sided test"* was utilized while reversing a Federal Dyer Act conviction in *United States* v. *Gambert,* 410 F2d 383 (4th, 1969).

An additional and equally confusing standard was uttered in *United States* v. *Conway,* 507 F2d 1047 (5th, 1975). In *Conway* the Court affirmed a multi-count Travel Act conviction where an issue on review was the improper argument by government counsel. The Court stated:

> "Appellant's final assignment of error is that the trial court erred in denying his motion for a mistrial when the Assistant United States Attorney commented in his closing argument on the fact that defense counsel 'has defended many a guilty client.' He contends that this placed an alleged fact before the jury which was not in evidence, and created an inference of guilt by association. The jury was instructed to disregard the remark. Although the statement was improper, when this trial is viewed in its entirety it cannot be said in light of the appropriate admonition that it had a substantial impact on the jury's verdict. This is the test prescribed in United States v. Arenas-Granada, 5 Cir., 1973. 487 F.2d 858, 859." (507 F2d at 1052).

Thus emerges an additional test, *i.e., "substantial impact* on the jury's verdict," (*Conway, ante* at 1052).

(3) The Supervisory Power of this Court.

The importance of this case cannot be overlooked. By "type of offense" or "sentence imposed" this case has relatively little meaning. A simple counterfeiting offense with a split sentence is hardly overwhelming. Yet, this case, because of its simplicity, provides the appropriate vehicle to Utilize the Supervisory Power of this Court *McNabb, et al.* v. *United States,* 318 U.S. 332 (1943). Not since *Berger* v. *United States,* 295 U.S. 78 (1935) has this Court really attempted to consider what effect, if any, there be in an entirely improper closing argument. We

all realize that four decades have passed since *Berger* and yet, as the cases contained in this Petition demonstrate, the several Circuits are at a loss to apply any "given" standard when reviewing the troublesome question of reversal *vel non* while dealing with improper closing argument.

We are not here seeking relief from a State conviction (*Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642, 643). Rather, we are seeking relief from a conviction suffered in a lower Federal Court. A court within the Supervisory Power of this Court. By implication, both this Court and the Court of Appeals in *Donnelly, ante,* suggested, *sub silentio,* that had *Donnelly* been convicted in a lower Federal Court, his conviction would have been overturned, if not on the grounds of "due process", then, by virtue of the Supervisory Power of this Court, or that possessed by the Court of Appeals. Why should this Court or any Federal Court of review, have to search an entire record merely to satisfy a quest to determine whether improper remarks could, should or might have improperly influenced a trial jury. The real answer lies in this Court using this case as a demonstrative example of what will happen to a Federal prosecution where the U.S. Attorney makes a grossly improper closing argument. Were this case to be reversed we hazard a guess that it would be quite a while before the Government would argue "harmless error" in any similar appeal. Rather, they (the Government) would be far more careful at the trial level.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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